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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL FOSTER BUMGARNER,

Defendant and Appellant.

C085296

(Super. Ct. No. 62129145)

Defendant Joel Foster Bumgarner pleaded no contest to felony evading an officer (Veh. Code, § 2800.2), and two misdemeanors, driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a)) and resisting an officer (Pen. Code, § 148, subd. (a)(1); statutory section references that follow are to the Penal Code unless otherwise set forth). He was placed on three years' formal probation subject to various conditions including paying victim restitution to be determined at a later time.

On appeal, defendant contends the restitution order was excessive to the extent it compensated for losses covered by defendant's insurer or for losses the victim did not suffer. We modify the restitution order and affirm as modified.

FACTS AND PROCEEDINGS

The facts of defendant's crimes are taken from the factual basis of his plea as follows: "On March 24, 2014, the defendant was reported by his girlfriend as driving while possibly under the influence after taking several prescription Ativan pills. The police located the vehicle that the defendant was driving. Deputies tried to pull over the vehicle by using both their lights and sirens. Their vehicles were clearly marked as law enforcement, Placer County Sheriff's Department, and officers were wearing uniforms at the time. The defendant was straddling the lanes. He was asked to pull over. Officers were using the PA system to try to get the defendant's attention. He was still continuing to not pull over. The defendant entered the freeway, running a stop sign going approximately 50 miles per hour, then reached 75 miles per hour. At a speed of 40 [miles per hour], the defendant tried to turn around in a cul-de-sac, and in that he hit three parked vehicles while trying to flee from deputies who eventually caught up with him."

A restitution hearing was held on May 31, 2017. The following evidence relevant to this appeal was presented at the hearing.

Timothy Bobzien, an employee of Winter Chevrolet and Sierra RV Center in Colfax, testified, in part, that on the day of the incident, defendant drove an SUV through the business's parking lot, "pinballing" off several recreation vehicles (RVs), going through a dealership's garage, a power station, an electro box, and a concrete pole before landing inside an RV. Four RVs were damaged by defendant. In a settlement between defendant's insurer, State Farm, and the dealership's insurer, Federated Insurance, State Farm paid Federated \$54,000 for the damage and paid the dealership \$16,000, which covered their deductible and a \$6,000 settlement for diminution of value.

One of the damaged vehicles was a Dutchmen Komfort RV, which had a retail value of \$7,720. It could not be repaired, and the dealership's insurance paid the dealership the wholesale price of the vehicle.

Another of the four damaged vehicles was a 2007 Rampage Latent RV. It had a retail value of \$16,900 and could not be repaired. The dealership also received an insurance payment for the wholesale price of this vehicle.

Bobzien also testified the damage caused the dealership to close for two days. This led to a \$2,000 loss based on employee wages for the two days. All six of the dealership's employees worked in the cleanup for those two days.

The trial court awarded \$13,050 in restitution plus 10 percent interest. It derived this amount in part from \$616 restitution for the Komfort, \$2,327 for the Rampage using the retail prices for those vehicles and \$2,000 for the two days the dealership closed to clean up. In determining the award, the trial court rejected using wholesale prices for the Komfort and the Rampage, finding those prices too speculative.

DISCUSSION

Defendant contends the restitution award regarding the two vehicles which were declared a total loss --that is, the Dutchmen Komfort RV and the 2007 Rampage Latent RV -- was excessive. He also challenges that portion of the restitution order regarding the employee wages for the two days employees spent cleaning up the damage defendant inflicted on the dealership. We will limit our discussion to those three items of restitution.

A. *Generally*

“[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.” (§ 1202.4, subd. (f);

see also Cal. Const., art. I, § 28, subd. (b)(13)(B).) “The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution.” (§ 1202.4, subd. (f)(1).)

“At the core of the victim restitution statutory scheme is the mandate that a victim who suffers economic loss is entitled to restitution and that the restitution is to be ‘based on the amount of loss claimed by the victim.’ Thus, a victim seeking restitution . . . initiates the process by identifying the type of loss (§ 1202.4, subd. (f)(3)) he or she has sustained and its monetary value.” (*People v. Fulton* (2003) 109 Cal.App.4th 876, 885-886.) Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. (*Id.* at p. 886.) “This approach complies with the statutory mandate that the amount of restitution is to be based on the ‘loss claimed by the victim’ and the designated right of the defendant to a hearing ‘to dispute the determination of the amount of restitution.’ ” (*Ibid.*)

The court “ ‘must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.’ [Citations.]” (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498.) The restitution shall, to the extent possible, include compensation for “[f]ull or partial payment for the value of stolen or damaged property,” the value of which “shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible.” (§ 1202.4, subd. (f)(3)(A).) “ ‘[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation]’ [Citation.]” (*People v. Reichler* (2005) 129 Cal.App.4th 1039, 1045.)

A trial court’s determination of the amount of restitution is reversible only if the appellant demonstrates a clear abuse of discretion. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.) “The order must be affirmed if there is a factual and rational basis for the amount. [Citation.]” (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.)

Where, as here, restitution was ordered as a condition of probation, the trial court had broad discretion to order restitution in a manner that would require defendant to “make amends ‘to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the [defendant].’ [Citation.]” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1126.) Accordingly, the only question is “whether the order is reasonably related to the crime of which the defendant was convicted or to future criminality.” (*In re I.M.* (2005) 125 Cal.App.4th 1195, 1209.) However, a trial court’s discretion in so imposing probation conditions “although broad, nevertheless is not without limits: a condition of probation must serve a purpose specified in [section 1203.1].” (*Carbajal*, at p. 1121.)

B. *Restitution for the Dutchmen Komfort RV and the Rampage Latent RV*

Defendant argues the trial court erred in using the retail price to determine the restitution for the totaled RV’s, since the dealership would be able to replace them at their wholesale rather than retail cost.

How to determine restitution for a retailer’s lost merchandise was addressed in *People v. Chappelone* (2010) 183 Cal.App.4th 1159 (*Chappelone*). The defendant in *Chappelone* was a Target employee who, with her codefendant husband, embezzled items from the store and sold them at yard sales. (*Id.* at pp. 1163, 1166-1167.) The defendant was convicted on conspiracy and grand theft charges and placed on probation. (*Id.* at p. 1168.) The prosecution sought restitution of \$278,678 for the value of the merchandise, inventory services and expenses, and the cost of transporting and storing the recovered goods. (*Ibid.*) The value of the stolen merchandise was determined from the goods’ retail price, which the trial court adopted in its restitution award. (*Id.* at pp. 1168, 1170.)

The defendant in *Chappelone* argued the trial court gave an erroneous windfall to Target by calculating the value of the merchandise from the retail rather than the

wholesale price. (*Chappelone, supra*, 183 Cal.App.4th at p. 1178.) The Attorney General countered that the retail price was appropriate, as victim restitution includes compensation for lost profits. (*Ibid.*; see § 1202.4, subd. (f)(3)(E).) The Court of Appeal agreed with defendant, finding the use of retail prices constituted a windfall because “the prosecutor presented no evidence that Target lost any profits as a result of the theft.” (*Chappelone*, at p. 1178.)

Winter Chevrolet was paid the wholesale value of the totaled RV’s by its insurer and defendant’s insurer in turn paid Winter Chevrolet’s insurer. The parties and the trial court believed restitution for the replacement value of the totaled RVs was inappropriate in light of the insurance settlement involving the victim, its insurer, and defendant’s insurer. Accordingly, the trial court did not exercise its discretion to award restitution for the replacement value of the two totaled RVs. (See *People v. Birkett* (1999) 21 Cal.4th 226, 245-247 [payment by victim’s insurer does not deprive trial court of discretion to order restitution for value of the covered loss as a condition of probation]; *People v. Bernal* (2002) 101 Cal.App.4th 155, 168 [payments by the defendant’s insurer offsets victim restitution by the amount paid].) What was sought and awarded here was restitution for the lost profits on the two totaled RVs, the difference between their wholesale and retail values. The trial court did not specifically state that it was awarding restitution based on lost profits for the two totaled RVs, but the nature of the award indicates this purpose. Evidence established the Rampage had a retail price of \$16,900, and the dealership’s insurer paid it the wholesale value of the vehicle, \$14,573.41. This establishes a gross profit (retail price minus wholesale price) of \$2,326.59; the trial court awarded \$2,327 for this RV. For the other totaled RV, the Komfort, it had a retail value of \$7,720 and insurance paid for the wholesale value of \$7,104.91, which establishes a gross profit of \$615.09. The trial court awarded \$616 in restitution for this RV.

While the prosecution in this case presented evidence that the dealership lost profits on the two damaged but repairable RVs, there was no evidence of any lost sale or

any evidence of lost profits on the two totaled RVs. As in *Chappelone*, the trial court here could not award restitution for lost profits in the absence of any evidence of such loss. The restitution award for lost profits on the two totaled RVs was erroneous.

The trial court awarded \$2,327 for the Rampage and \$616 for the Komfort, for a total of \$2,943 for the two RVs that could not be repaired. We modify the restitution award to reduce it by this \$2,943, for a total restitution award of \$10,107.

C. *Restitution for Employee Wages*

Regarding the employee wages, defendant claims the dealership would have paid the employees the same wages for their two days of cleanup work and would have incurred the same costs if the dealership had been open. He concludes restitution for wages for the two days is an improper windfall to the dealership.

While we agree with defendant regarding the totaled RVs, we reject his contention regarding employee wages. Although defendant is correct that the dealership would pay these wages whether or not defendant caused the dealership to close down to fix the damage, his conclusion that the dealership suffered no losses as a result, is not. As a result of defendant's crimes, the dealership lost the value of two days' labor from the employees, who would have been doing income-producing work for the dealership if defendant had not committed his crimes as opposed to cleaning the dealership up. The employee's wages is an appropriate proxy for their lost efforts to generate income for the dealership instead of cleaning up a dealership closed by defendant's acts.

DISPOSITION

The restitution award is modified to \$10,107. As modified, the restitution order is affirmed.

HULL, Acting P. J.

We concur:

BUTZ, J.

MURRAY, J.